

October 15, 2015

**VIA ECFS**

Chairman Tom Wheeler  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Commissioner Mignon Clyburn  
Federal Communications Commission  
445 12th Street, SW  
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Commissioner Jessica Rosenworcel  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Commissioner Ajit Pai  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Commissioner Michael O’Rielly  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

**Re: WC Docket No. 12-375 – Written Ex Parte Presentation**

Dear Chairman Wheeler, Commissioner Clyburn, Commissioner Rosenworcel,  
Commissioner Pai, and Commissioner O’Rielly:

The undersigned parties are the primary providers of inmate calling services (“ICS”) in the United States, representing more than 90% of industry revenue in 2014. This joint submission is provided in response to the Fact Sheet released September 30, 2015,<sup>1</sup> in this docket.<sup>2</sup> The FCC’s proposed direction for ICS rates and rules as described in the Fact Sheet will have a devastating effect on ICS providers as well as the end users of ICS unless the existing site commission system is addressed directly, such as by replacing site commissions with fixed administrative support payments. The undersigned parties respectfully submit the attached paper demonstrating that the FCC has the authority and the record support<sup>3</sup> to address and reform the existing ICS site commission system in furtherance of its statutory mandate and the public interest.

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<sup>1</sup> FACT SHEET: Ensuring Just, Reasonable, and Fair Rates for Inmate Calling Services (rel. Sept. 30, 2015), available at <https://www.fcc.gov/document/fact-sheet-ensuring-just-reasonable-fair-rates-inmate-calling>.

<sup>2</sup> *Rates for Interstate Inmate Calling Services*, 28 FCC Rcd 14107 (2013) (“*ICS Order and First FNPRM*”), *pets. for stay granted in part sub nom. Securus Tech., Inc. v. FCC*, No. 13-1280 (D.C. Cir. Jan.13, 2014), *pets. for review pending sub nom. Securus Tech., Inc. v. FCC*, No. 13-1280 (D.C. Cir. filed Nov. 14, 2013) (and consolidated cases); *Rates for Interstate Inmate Calling Services*, 29 FCC Rcd 13170 (2014) (“*Second ICS FNPRM*”).

<sup>3</sup> In response to a request during the signatories’ meeting with Commissioner Clyburn and General Counsel, Jonathan Sallet, a separate index of record evidence supporting the FCC’s exercise of its authority over site commissions will be provided separately, which will supplement the attached.

Pursuant to Section 1.1206(b) of the FCC's rules, a copy of this notice is being filed in the appropriate docket.

Respectfully submitted,

/s/ Chérie R. Kiser

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Attachment

cc (via e-mail): Chairman Tom Wheeler  
Commissioner Mignon Clyburn  
Commissioner Jessica Rosenworcel  
Commissioner Ajit Pai  
Commissioner Michael O'Rielly  
Jonathan Sallet  
David Gossett  
Richard D. Mallen  
Suzanne Tetreault  
Stephanie Weiner  
Rebekah Goodheart  
Travis Litman  
Nicholas Degani  
Amy Bender  
Madeleine Findley  
Pamela Arluk  
Lynne Engledow  
Rhonda Lien  
Bakari Middleton  
Thomas Parisi  
Gil Strobel

## THE FCC HAS JURISDICTION TO ADDRESS AND REFORM THE EXISTING SITE COMMISSION SYSTEM

The goal of the Federal Communications Commission (“FCC”) in this proceeding<sup>1</sup> “is to move to a market-based solution to reduce rates” for inmate calling services (“ICS”).<sup>2</sup> For the past 13 years, the FCC consistently has found that site commission payments are “the single largest component affecting the rates for inmate calling service.”<sup>3</sup> The record demonstrates that site commission payments are a “significant contributor to high rates” and the “significant driver of increases to rates charged to inmates.”<sup>4</sup> The FCC cannot succeed in its goal of market-based ICS rates without also addressing the current system of unconstrained site commission payments.

The Communications Act of 1934, as amended (the “Act”), and well-established FCC precedent provide the FCC with the legal authority and jurisdiction necessary to address and reform existing site commission practices. The FCC’s failure to exercise its jurisdiction over site commissions would be contrary to record evidence,<sup>5</sup> arbitrary and capricious<sup>6</sup> and violate well-

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<sup>1</sup> *Rates for Interstate Inmate Calling Services*, 28 FCC Rcd 14107 (2013) (“*ICS Order and First FNPRM*”), *pets. for stay granted in part sub nom. Securus Tech., Inc. v. FCC*, No. 13-1280, Order (D.C. Cir. Jan.13, 2014), *pets. for review pending sub nom. Securus Tech., Inc. v. FCC*, No. 13-1280 (D.C. Cir. filed Nov. 14, 2013) (and consolidated cases); *Rates for Interstate Inmate Calling Services*, 29 FCC Rcd 13170 (2014) (“*Second ICS FNPRM*”).

<sup>2</sup> *Second ICS FNPRM* ¶ 47; *see also id.* ¶ 6 (seeking “comment on moving to a market-based approach to encourage competition in order to reduce rates to just and reasonable levels and to ensure fair but not excessive ICS compensation”).

<sup>3</sup> *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 17 FCC Rcd 3248, ¶ 10 (2002) (“*2002 Order*”); *see also ICS Order and First FNPRM* ¶ 41 (same); *Rates for Interstate Inmate Calling Services*, 27 FCC Rcd 16629, ¶ 37 (2012) (“*ICS NPRM*”) (same).

<sup>4</sup> *ICS Order and First FNPRM* ¶¶ 33, 38; *see also id.* ¶ 34 (“The record makes clear that where site commission payments exist, they are a significant factor contributing to high rates.”).

<sup>5</sup> *See, e.g., Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962) (“The agency must make findings that support its decision, and those findings must be supported by substantial evidence.”). *Chevron* deference will not save an FCC decision that fails to address site commissions. *See Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-44 (1984). Under the second step of the *Chevron* analysis, “an agency’s decision is arbitrary and capricious when it is contrary to law or when the agency’s process in rendering its decision was irrational or unsupported by the record.” *Fontana v. Caldera*, 160 F. Supp. 2d 122, 129 (D.D.C. 2001). *Chevron* “deference is not due where findings and conclusions are based on inferences or presumptions that are not reasonably grounded in the record, viewed as a whole.” *Kang v. Attorney General of the United States*, 611 F.3d 157, 163-64 (3d Cir. 2010) (internal citations omitted).

<sup>6</sup> *See, e.g., Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Auto Insurance Co.* 463 U.S. 29, 44 (1983) (“[a]n agency rule is arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”).

established ratemaking principles.<sup>7</sup> The FCC therefore must address site commissions as a component of its announced ICS reforms in this proceeding.

## **I. SECTION 276 GIVES THE FCC THE ABILITY TO ADDRESS SITE COMMISSIONS FOR BOTH INTERSTATE AND INTRASTATE ICS RATES**

The FCC has the authority under Section 276 to reform the existing site commission system for both interstate and intrastate inmate calls.<sup>8</sup> In the *ICS Order and FNPRM*, the FCC tentatively (and correctly) concluded “that section 276 affords the Commission broad discretion to regulate intrastate ICS rates and practices that deny fair compensation, and to preempt inconsistent state requirements.”<sup>9</sup> Section 276 gives the FCC a broad mandate to promote competition among inmate payphone providers and widespread access to payphones by inmates. Congress enacted the provision as part of the Telecommunications Act of 1996 (the “1996 Act”), which established a “pro-competitive deregulatory national framework” to “accelerate” deployment of telecommunications services “by opening all telecommunications markets to competition.”<sup>10</sup> Section 276 implements these objectives in the context of inmate and other

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<sup>7</sup> See, e.g., *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989) (finding the Fifth Amendment to the Constitution protects regulated entities from regulations that are “so unjust as to be confiscatory”); *AT&T v. FCC*, 836 F.2d 1386, 1391-92 (D.C. Cir. 1988) (rejecting FCC rule that would “guarantee the regulated company an economic loss”); *Alabama Cable Telecomms. Ass’n v. Alabama Power Co.*, 16 FCC Rcd 12209, ¶ 51 (2001) (“if the end results of the regulations are ‘[r]ates which enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed’ then the regulations are constitutionally valid”) (citing *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 605 (1944)).

<sup>8</sup> Federal-level correctional facilities generally do not require the payment of site commissions for ICS calls originating from their facilities. See, e.g., *ICS Order and First FNPRM* ¶ 4 (“we acknowledge that some federal agencies, such as the Department of Homeland Security’s Immigration Customs and Enforcement (ICE), have taken similar measures to provide lower rates, resulting in nationwide calling rates of \$0.12 per minute without additional fees or commissions at ICE facilities”).

<sup>9</sup> *ICS Order and First FNPRM* ¶ 135.

<sup>10</sup> S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996). The FCC’s failure to address site commissions also directly conflicts with the FCC’s statutory obligation to adopt rules and policies that support the deployment of broadband technology and advanced services to all Americans. See, e.g., 47 U.S.C. § 157(a) (“It shall be the policy of the United States to encourage the provision of new technologies and services to the public.”); 47 U.S.C. § 230(a), (b) (noting the benefits of Internet and interactive computer services and establishing it as “the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services and other interactive media”); 47 U.S.C. § 254(b)(2) (stating the FCC shall base its policies on the principle that “[a]ccess to advanced telecommunications and information services should be provided in all regions of the Nation”); 47 U.S.C. § 1301, 1302 (finding that “deployment and adoption of broadband technology is vital” and stating the FCC “shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans”). The FCC repeatedly has said that its “end goal is to ensure the ubiquitous and affordable availability of broadband for all Americans” and that broadband is a “top priority” at the FCC. See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment pursuant to Section 706 of the Telecommunications Act of 1996*, 23 FCC Rcd 9615, ¶ 76 (2008); Letter from Chairman Wheeler to the Honorable Jim Bridenstine (Apr. 9, 2015) (“expanding high-speed broadband to all corners of the country is a top priority for the Commission”); see also Remarks of Commissioner Mignon L. Clyburn, “Realizing Broadband’s Grand Promise

payphone services. Section 276(b)(1) directs the FCC to prescribe regulations to “promote competition among payphone service providers and promote the widespread deployment of payphone services.”<sup>11</sup> To meet these goals, the FCC must, among other things, “establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone.”<sup>12</sup> Section 276(d) specifically defines “payphone services” to include “inmate telephone service.”<sup>13</sup>

Section 276 gives the FCC express authority to preempt any “State requirements” that “are inconsistent with the Commission’s regulations.”<sup>14</sup> Both the courts and the FCC have interpreted the statute to provide broad authority to regulate interstate *and* intrastate rates. As the D.C. Circuit has recognized, “the FCC could not carry out [its Section 276] mandate without addressing intrastate matters.”<sup>15</sup> In *Illinois Public Telecommunications Association v. FCC*, the D.C. Circuit found that the provision requiring payphone operators to be “fairly compensated” gave the FCC “the authority to set local coin call rates in order to achieve that goal.”<sup>16</sup> If the FCC can prescribe rates for local telephone calls, it can prescribe rates for other intrastate rates as well.<sup>17</sup> Further, in *AT&T v. Iowa Utilities Board*, the United States Supreme Court held that

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for Consumer Health IT” (Sept. 15, 2014) (“broadband in and of itself is not the goal, it is about what broadband enables”). The FCC’s planned approach flies in the face of the FCC’s broadband deployment goals, and is counter to the FCC’s previous actions to take “significant steps to better enable the private sector to deploy broadband facilities to all Americans.” See *Connect America Fund, et al.*, 26 FCC Rcd 17663, ¶ 5 (2011) (“extending and accelerating fixed and mobile broadband deployment has been one of the Commission’s top priorities over the past few years” by taking “a series of significant steps to better enable the private sector to deploy broadband facilities to all Americans”). The FCC has utilized its authority under 47 U.S.C. § 1302 (also known as Section 706 of the 1996 Act) “to preempt state laws” that “conflict with the federal policy set out in section 706.” See *City of Wilson, North Carolina Petition for Preemption of North Carolina General Statute Sections 160A-340 et seq.*, 30 FCC Rcd 2406, ¶¶ 10, 15 (2015) (“To put it plainly, the Commission has concluded that preemption of these restrictions will expand broadband investment and deployment, increase competition, and serve the public interest, as Section 706 intended.”), *appeal pending*.

<sup>11</sup> 47 U.S.C. § 276(b)(1).

<sup>12</sup> 47 U.S.C. § 276(b)(1)(A).

<sup>13</sup> 47 U.S.C. § 276(d).

<sup>14</sup> 47 U.S.C. § 276(c); see also *City of Wilson, North Carolina Petition for Preemption of North Carolina General Statute Sections 160A-340 et seq.*, 30 FCC Rcd 2406, ¶ 47 (2015) (“It is well established that while states and federal government share jurisdiction over the regulation of communications, state laws may be preempted where they conflict with the Commission’s prerogative to regulate interstate communications.”), *appeal pending*.

<sup>15</sup> *New England Public Communications Council, Inc. v. FCC*, 334 F.3d 69, 76 (D.C. Cir. 2003) (quotations omitted).

<sup>16</sup> *Illinois Public Telecommunications Ass’n v. FCC*, 117 F.3d 555, 562 (D.C. Cir. 1997) (subsequent history omitted).

<sup>17</sup> *Metrophones Telecomms., Inc. v. Global Crossing Telecomms., Inc.*, 423 F.3d 1056, 1072 (9th Cir. 2005) (recognizing that Section 276 “substantially expands the Commission’s jurisdiction and gives it broad authority to regulate both intrastate and interstate payphone calls”) (subsequent history omitted); *New England Public Communications Council, Inc. v. FCC*, 334 F.3d 69, 75-76 (D.C. Cir. 2003) (finding that Section 276 “unambiguously and straightforwardly authorizes the Commission to regulate the [Bell Operating Companies’]

the local competition provisions of the 1996 Act grant the FCC authority to regulate intrastate matters.<sup>18</sup> The same is true of Section 276.<sup>19</sup>

The FCC also has construed Section 276 as a grant of authority to regulate intrastate rates: the statute “establishes a comprehensive federal scheme of payphone regulation, both intra- and interstate, to be administered by the Commission,”<sup>20</sup> and contains specific directives – including Section 276(b)(1)(A) – with “explicit application to intrastate matters.”<sup>21</sup> The FCC has explained, this “focus on intrastate regulation alone indicates Congress’ intent that the Commission occupy the field,” which “is not surprising” because “[a]n overarching federal program is necessary to achieve” the purposes of the statute.<sup>22</sup>

The D.C. Circuit and the Commission have each recognized that the FCC’s “jurisdiction does not arise by implication, and it need not be narrowly construed” because it has “an express mandate to preempt state regulation of intrastate payphone line rates.”<sup>23</sup> The “analysis of whether state requirements are ‘inconsistent’ with the federal regulations within the meaning of § 276(c) is substantially identical to the analysis of implied conflict preemption.”<sup>24</sup> A state requirement is “inconsistent” with federal law - and is preempted - if it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” or “as is more relevant in applying Section 276(c), the purposes and objectives of the Commission.”<sup>25</sup>

Promoting competition in the market for payphone services requires attention to the rates charged for every call, not just interstate ones. The same goes for ensuring that providers are fairly compensated; as the FCC has noted, it must ensure that providers receive neither less nor

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intrastate payphone line rates,” and noting that “[a]ll of the[] provisions” in Section 276(b)(1) “apply to both intrastate and interstate matters”) (emphasis added).

<sup>18</sup> *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 380-81 (1999).

<sup>19</sup> *New England Public Communications Council*, 334 F.3d at 76-77 (recognizing that, “in passing the 1996 Act’s payphone competition provision and the local competition provisions, Congress had exactly the same objective: to authorize the Commission to eliminate barriers to competition,” and noting that it would be similarly impossible to implement the Section 276 competition provisions “while limiting the Commission’s authority to interstate services”).

<sup>20</sup> *Wisconsin Public Service Comm’n*, 17 FCC Rcd 2051, ¶ 35 (2002) (“*Wisconsin Order*”).

<sup>21</sup> *Wisconsin Order* ¶ 34.

<sup>22</sup> *Wisconsin Order* ¶ 35.

<sup>23</sup> *Wisconsin Order* ¶ 42, n.97; accord *Illinois Public Telecommunications*, 117 F.3d at 563 (stating that, because “the Commission has been given an express mandate to preempt State regulation of local coin calls . . . , the requirement that the FCC’s regulation be narrowly tailored simply does not come into play”).

<sup>24</sup> *Metrophones*, 423 F.3d at 1073.

<sup>25</sup> *Metrophones*, 423 F.3d at 1073 (“[S]tate law is preempted ‘to the extent it actually interferes with the methods by which the federal [regulatory scheme] was designed to reach its goal.’”) (citing *Ting v. AT&T*, 319 F.3d 1126, 1137 (9th Cir. 2003)).



more compensation than is fair for each interstate and intrastate call.<sup>26</sup> The practice of charging site commissions not tied to the costs of administering inmate calling service does not “fairly compensate[]” providers for “each and every completed interstate and intrastate call,” as Section 276(b)(1)(A) requires. To the extent the FCC’s regulations implementing these directives come into conflict with state laws, the state laws must give way.

## II. THE FCC HAS THE AUTHORITY TO REGULATE ICS SITE COMMISSION CONTRACTUAL ARRANGEMENTS

FCC rules take precedence over any contracts enacted after the 1996 Act.<sup>27</sup> The FCC found in the *ICS Order and FNPRM*:

Agreements between ICS providers and correctional facilities - to which end users are not parties - cannot trump the Commission’s authority to enforce the requirements of the Communications Act to protect those users within the Commission’s jurisdiction. . . . To the extent that any particular agreement needs to be revisited or amended (a matter on which we do not take a position), such result would only occur because agreements cannot supersede the Commission’s authority to ensure that the rates paid by individuals who are not parties to those agreements are fair, just, and reasonable.<sup>28</sup>

The FCC’s findings are consistent with well-established law recognizing the FCC’s jurisdiction to intervene in contractual relationships between regulated common carriers and other entities, even those entities that are not subject to FCC regulation. Each of these precedents supports the FCC’s authority to address site commissions as reflected in the contracts between ICS providers and correctional facilities.

First, under the *Sierra-Mobile* doctrine, freely negotiated contracts are considered “just and reasonable” and enforced unless the “public interest” requires that they be modified or abrogated.<sup>29</sup> As the D.C. Circuit has stated, the *Sierra-Mobile* doctrine gives the FCC “the

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<sup>26</sup> *ICS Order and First FNPRM* ¶ 46 (“[T]he concept of fairness encompasses both the compensation received by ICS providers and the cost of the call paid by the end-user.”); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 17 FCC Rcd 21274, ¶ 82 (2002) (“Section 276 requires us to ensure that per-call compensation is fair, which implies fairness to both sides.”); *see also Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 2545, ¶ 55 (1999) (“PSPs will be fairly compensated if, at a minimum, we . . . balance interests of PSPs and those parties that will ultimately pay the default compensation amount. . . .”).

<sup>27</sup> *ICS Order and First FNPRM* at n.365; *see also* 47 U.S.C. § 276(b)(3).

<sup>28</sup> *ICS Order and First FNPRM* ¶ 101.

<sup>29</sup> *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 353–55 (1956); *United Gas Co. v. Mobile Gas Corp.*, 350 U.S. 332, 344 (1956); *see also Freeport-McMoRan Corp. v. FERC*, 669 F.3d 302, 306 (D.C. Cir. 2012) (finding the

power to prescribe a change in contract rates when it finds them to be unlawful . . . and to modify other provisions of private contracts when necessary to serve the public interest.”<sup>30</sup> Where “a private contract” has a “deleterious effect” or “harms the public interest,” the FCC has the authority to “override” or “modify” that contract,<sup>31</sup> as the FCC has recognized on numerous occasions.<sup>32</sup>

Second, in the international settlements context, the FCC determined it had the authority to address the “practices” of international carriers over which the FCC did not have jurisdiction.<sup>33</sup> The FCC determined, “because an accounting rate is the charge negotiated between a U.S. international carrier and its foreign correspondent for handling one minute of international telephone service,” the plain language of the Act gave the FCC jurisdiction over such charges.<sup>34</sup> Some commenters also argued the FCC could not regulate settlement rates given that those arrangements were contained in contracts between U.S. carriers and foreign entities. The FCC rejected that argument, finding rates “memorialized in inter-carrier contracts does not insulate them from our review.”<sup>35</sup> The FCC determined it was permitted “to review and modify” contracts when it found they were in violation of the Act.<sup>36</sup>

On appeal, the D.C. Circuit upheld the FCC’s decision finding the FCC acted well within its jurisdiction to regulate U.S. carriers.<sup>37</sup> Specifically, the court found:

We recognize that regulating what domestic carriers may pay and regulating what foreign carriers may charge appear to be opposite sides of the same coin. But by focusing only on the Order’s effects on foreign

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agency had authority under the *Sierra-Mobile* doctrine “to proscribe contractual arrangements that contravene the relevant public interests”).

<sup>30</sup> *Western Union Telegraph Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987) (citing *Fed. Power Comm’n v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) and *United Gas Pipe Line Co. v. Mobile Gas Service Co.*, 350 U.S. 332 (1956)).

<sup>31</sup> *Texaco, Inc. v. FERC*, 148 F.3d 1091, 1097 (D.C. Cir. 1998); see also *Cellco Partnership v. FCC*, 700 F.3d 534, 543 (D.C. Cir. 2012) (upholding FCC data roaming that “dictates certain interactions between licensees and third parties”).

<sup>32</sup> See, e.g., *Securus Tech., Inc. v. FCC*, No. 13-1280, Brief for the Federal Communications Commission at 65 (filed July 21, 2014) (“the FCC is free to require a party within its jurisdiction to repudiate contracts with third parties that the agency deems against the public interest”); see also *ICS Order and First FNPRM* at n.365.

<sup>33</sup> See generally *International Settlement Rates*, 12 FCC Rcd 19806 (1997) (“*International Settlement Order*”).

<sup>34</sup> *International Settlement Order* ¶ 283; see also *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986) (rejecting a narrow reading of the words “charges,” “classifications,” and “practices” in Section 2(b) of the Act, finding that such terms encompassed depreciation).

<sup>35</sup> *International Settlement Order* ¶ 306.

<sup>36</sup> *International Settlement Order* ¶ 306.

<sup>37</sup> *Cable & Wireless v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999).



carriers, petitioners overlook the **crucial economic reality** that makes the Commission's position that it is only regulating domestic carriers: Because domestic carriers operate in a competitive market, they face a dilemma when they bargain with monopolist foreign carriers. As a group, U.S. carriers would be best off if each decided not to accept settlement rates higher than FCC benchmarks. But if one U.S. carrier maintained this position to the point of impasse in negotiations with a foreign carrier, a competing U.S. carrier would make the foreign carrier a higher offer. As the intervenors on behalf of the FCC explain, the Order "requir[es] domestic carriers to take 'a unified bargaining position,' and thereby prevent[s] each carrier from acting in its own self-interest."<sup>38</sup>

The court also confirmed that the FCC "does not exceed its authority simply because a regulatory action has extraterritorial consequences."<sup>39</sup> The court also rejected petitioners' arguments that the FCC was only allowed to regulate the terms on which U.S. carriers offer telecommunication services to the public (including retail rates), not the prices U.S. carriers pay to non-FCC-regulated entities for goods and services.<sup>40</sup> The court confirmed that, "[u]nder the *Sierra-Mobile* doctrine, the Commission may modify such agreements as it deems necessary to serve the public interest."<sup>41</sup>

Third, the FCC has limited the contracting rights of common carriers in the context of commercial and residential multi-tenant buildings ("MTEs").<sup>42</sup> The FCC based its decision in large part on its findings that exclusive contracts perpetuate the barriers to facilities-based competition that the 1996 Act was designed to eliminate.<sup>43</sup> In short, the FCC concluded "that, in today's marketplace, exclusive contracts for telecommunications service in commercial settings impede the pro-competitive purposes of the 1996 Act and appear to confer no substantial countervailing public benefits," and thus "we find that a carrier's agreement to such a contract is an unreasonable practice" that triggers the FCC's authority under the Act to prohibit unreasonable practices.<sup>44</sup> The FCC determined that any state regulation that conflicted with its

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<sup>38</sup> *Cable & Wireless*, 166 F.3d at 1229 (emphasis added).

<sup>39</sup> *Cable & Wireless*, 166 F.3d at 1230; see also *Radio Television S.A. de C.V. v. FCC*, 130 F.3d 1078, 1082 (D.C. Cir. 1997); *RCA Communications, Inc. v. United States*, 43 F. Supp. 851, 854–55 (S.D.N.Y., 1942); *In re Mackay Radio & Telegraph Co.*, 2 F.C.C. 592, 598–99 (1936).

<sup>40</sup> *Cable & Wireless*, 166 F.3d at 1231.

<sup>41</sup> *Cable & Wireless*, 166 F.3d at 1232.

<sup>42</sup> *Promotion of Competitive Networks in Local Telecommunications Markets*, 15 FCC Rcd 22983 (2000) ("2000 Competitive Networks Order"); *Promotion of Competitive Networks in Local Telecommunications Markets*, 23 FCC Rcd 5385 (2008) ("2008 Competitive Networks Order").

<sup>43</sup> *2000 Competitive Networks Order* ¶ 35.

<sup>44</sup> *2000 Competitive Networks Order* ¶ 35.

new rules would be subject to preemption.<sup>45</sup> The FCC also reiterated the D.C. Circuit's *Cable & Wireless* holding that the FCC "has authority to regulate the contractual or other arrangements between common carriers and other entities, even those entities that are generally not subject to Commission regulation."<sup>46</sup>

In the *2000 Competitive Networks Order*, the FCC limited its contractual prohibition to new contracts, leaving existing contracts in place pending further review.<sup>47</sup> In its 2008 *Competitive Networks Order*, however, the FCC went further and prohibited the enforcement of existing contracts for residential MTEs.<sup>48</sup> Citing to *Western Union*, the Commission stated it "has clear authority to 'modify . . . provisions of private contracts when necessary to serve the public interest.'"<sup>49</sup> The FCC concluded that its "prohibition on enforcement of the exclusivity provisions at issue substantially advances the government interest in preventing unreasonable practices" and was "based on [the] weighing of the relative costs and benefits of such provisions."<sup>50</sup> The FCC found it had "ample authority to regulate telecommunications carriers' contractual conduct even though it may have a tangential effect on MTE owners."<sup>51</sup>

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<sup>45</sup> *2000 Competitive Networks Order* ¶ 39. The FCC also specifically preempted state and local regulations that would prevent consumers from utilizing fixed wireless antennas to receive telecommunications services. *Id.* ¶ 101. The FCC found that "preemption of state and local regulation" was "justified" given that the existing "regulatory regime effectively hinders one of the principal goals of the 1996 Act." *Id.*; see also *id.* ¶¶ 102-07 (discussing the statutory provisions giving the FCC authority to preempt state and local regulations). The FCC determined that its preemption of "restrictions imposed by state and local governments" fell "well within the bounds of established preemption principles" because the FCC "may preempt state law when, among other reasons, it 'stands as an obstacle to the accomplishment and execution of the full objectives of Congress'" or when "regulation affects both interstate and intrastate services" and it is "not possible to separate the interstate and the intrastate components" of the regulation." See *id.* ¶ 107 (citing *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355 (1986) and *NARUC v. FCC*, 746 F.2d 1492 (D.C. Cir. 1984)).

<sup>46</sup> *2008 Competitive Networks Order* ¶ 15 (citing *Cable & Wireless v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999)).

<sup>47</sup> *2000 Competitive Networks Order* ¶ 37 ("We note that existing exclusive contracts, in addition to new exclusive contracts, may be a barrier preventing customers from obtaining the benefits of the more competitive access environment envisioned in the 1996 Act, and that the Commission has previously exercised its authority to modify provisions of private contracts when necessary to serve the public interest. We recognize, though, that the modification of existing exclusive contracts by the Commission would have a significant effect on the investment interests of those building owners and carriers that have entered into such contracts. Thus, we are inclined to proceed cautiously in this area, and seek further comment in the *Further Notice of Proposed Rulemaking* on whether we should prohibit carriers from enforcing exclusive access provisions in existing contracts in either commercial or residential MTEs.").

<sup>48</sup> *2008 Competitive Networks Order* ¶ 16.

<sup>49</sup> *2008 Competitive Networks Order* ¶ 17 (citing *Western Union Telegraph Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987)). The FCC further stated that it previously had exercised its authority when private contracts had violated the Act, citing, for example, *Expanded Interconnection with Local Telephone Company Facilities*, 9 FCC Rcd 5154, ¶¶ 197-208 (1994), remanded on other grounds, *Pacific Bell v. FCC*, 81 F.3d 1147 (D.C. Cir. 1996); *Competition in the Interstate Interexchange Marketplace*, 7 FCC Rcd 2677, ¶¶ 23-28 (1992).

<sup>50</sup> *2008 Competitive Networks Order* ¶ 18.

<sup>51</sup> *2008 Competitive Networks Order* ¶ 18.

Fourth, the FCC prohibited cable operators from entering into exclusive service contracts in multi-dwelling units,<sup>52</sup> and the D.C. Circuit upheld the FCC's decision.<sup>53</sup> Petitioners argued that the FCC had impermissibly ventured into real estate affairs over which it has no jurisdiction, but the court rejected that argument finding the "terms of the challenged prohibition apply only to cable companies, however, and they neither require nor prohibit any action by MDUs."<sup>54</sup> The court cited its previous findings in *Cable & Wireless* that "most every agency action has relatively immediate effects for parties beyond those directly subject to regulation."<sup>55</sup>

Fifth, the D.C. Circuit rejected a challenge to the FCC's regulation of home satellite dishes on leased properties, which petitioners argued unlawfully regulated the real estate industry or the landlord-tenant relationship.<sup>56</sup> The court found, "[w]here the Commission has been instructed by Congress to prohibit restrictions on the provision of a regulated means of communication, it may assert jurisdiction over a party that directly furnishes those restrictions, and, in so doing, the Commission may alter property rights created under State law."<sup>57</sup>

Each of these decisions supports the FCC's exercise of authority over site commission payments and the contractual arrangements between ICS providers and correctional facilities in order to fulfill its Section 276 obligations.

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<sup>52</sup> *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd 20235 (2007). The FCC also emphasized that its 2008 *Competitive Networks Order* was consistent with this prior decision. See 2008 *Competitive Networks Order* ¶ 16.

<sup>53</sup> *National Cable & Telecommun. Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009).

<sup>54</sup> *National Cable*, 567 F.3d at 666-67.

<sup>55</sup> *National Cable*, 567 F.3d at 666-67.

<sup>56</sup> *Building Owners and Manager Assoc. Int'l v. FCC*, 254 F.3d 89 (D.C. Cir. 2001) (addressing the FCC's decision in *Implementation of Section 207 of the Telecommunications Act of 1996 – Restrictions on Over-the-Air Reception Devices*, 13 FCC Rcd 23874 (1998)).

<sup>57</sup> *Building Owners*, 254 F.3d at 96 (citing *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368–69 (1986); *Fidelity Fed. Savings and Loan Ass'n v. De la Cuesta*, 458 U.S. 141 (1982); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 698–700 (1984); *New York State Comm'n on Cable Television v. FCC*, 749 F.2d 804, 807–08 (D.C. Cir. 1984)).